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In the Supreme Court of the United States

OCTOBER TERM, 1985

GLEN BORYS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOHN F. DE PUE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether the detention of petitioner was supported by reasonable suspicion.

2. Whether the detention of petitioner's luggage long enough to permit its exposure to a narcotics detection dog violated the Fourth Amendment because of its duration.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 766 F.2d 304.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1985. A petition for rehearing was denied on August 21, 1985 (Pet. App. 20a). The petition for a writ of certiorari was filed on October 21, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 18 months' imprisonment to be followed by a three-year special parole term. The court of appeals affirmed.

1. As summarized by the court of appeals (Pet. App. 1a-4a), evidence developed during a suppression hearing showed that at approximately 4:00 p.m. on September 4, 1981, DEA Agents Peter O'Brien and Milo Grassman were at Chicago's O'Hare Airport observing passengers deplane from a Delta Airlines flight originating in Orlando, Florida, a city known to them as a source city for narcotics. Their attention was drawn to petitioner, who was one of the first passengers to leave the plane. The agents observed that, although the first passengers to leave a plane ordinarily are well dressed businessmen from the first class section who would have checked their bags, petitioner was casually dressed with collar length hair and a Fu Manchu type mustache, and he was carrying two bulky pieces of luggage. The agents also noticed that, although the flight was on time, petitioner walked down the concourse in a rapid manner as if in a hurry and that he looked back in their direction as he walked. Pet. App. 1a-2a.

Their suspicion aroused, the agents began to follow petitioner but, because he was walking so rapidly, they lost sight of him by the time they reached the baggage claim area. After leaving the terminal, they located him near a livery stand. Petitioner then reentered the terminal, walked past the agents, and went into a luggage locker area. After approximately 15 seconds petitioner emerged, and the agents approached him, identified themselves, and requested to speak with him. Petitioner responded, "Sure, what do you want?" Agent O'Brien then asked him for identification, and petitioner replied that he had lost his wallet and asked if he could go to the Delta counter and inquire about it. Pet. App. 2a.

After the agents told petitioner that he could go inquire about his wallet, he returned to the upper level of the terminal and spoke with a Delta employee while the agents

watched from a distance. Agent O'Brien then asked petitioner whether he had airline tickets, to which he responded negatively. Upon further questioning, petitioner gave his correct name and stated that he was returning from a four-day trip to Orlando. Pet. App. 2a-3a.

Subsequently, Agent O'Brien observed the Delta employee give petitioner a ticket, and he asked petitioner whether he could see it. When petitioner complied, examination of the ticket revealed that it was a first class Chicago-Orlando round-trip ticket that had been purchased with cash and that petitioner had been in Orlando for ten days, rather than four days as he had claimed. Petitioner then informed the agents that he had to file a claim for his wallet. As he proceeded to the Delta baggage claim office to do so, the agents followed him and observed that he appeared to be visibly shaken and that he continuously dropped various items. When he requested permission to make a phone call, the agents assented; they observed that no party answered the call and that petitioner's nervousness continued. Pet. App. 3a.

Agent O'Brien then explained to petitioner that he and Agent Grassman had reason to believe that he was transporting drugs and requested permission to search his luggage. When petitioner refused to consent, the two agents returned to the vicinity of the Delta baggage office where they were joined by DEA Agents Anderson and Fulkerson. Agent Anderson observed petitioner remove a briefcase from one of his pieces of luggage. O'Brien then told him that, although he was not under arrest, the briefcase would be detained and an attempt made to procure a warrant to search it. When petitioner inquired whether he could keep the briefcase, Anderson responded that he could retain it if he first consented to a search of its contents. Although petitioner was advised of his right to refuse the search, he consented. The ensuing search revealed a tube with a black

plastic cap that contained a white powder residue and appeared to be paraphernalia to "free base" cocaine. Anderson then confiscated the tube and returned the briefcase to petitioner. He also wrote a receipt for the two pieces of luggage and explained how petitioner could retrieve them in the event that no warrant was obtained or no drugs found. Petitioner then left the airport at approximately 4:45 p.m. Pet. App. 3a-4a.

Following petitioner's departure, the agents took his luggage to the DEA's airport office where they contacted the Customs Service and requested the services of a drug detecting dog. When the dog arrived at approximately 6:00 p.m., it reacted positively to petitioner's luggage, indicating the presence of narcotics. A search warrant, based upon the dog's alert, was obtained from a state judicial officer at approximately 9:55 p.m., and the resulting search culminated in the discovery in both pieces of luggage of over two pounds of a mixture containing cocaine. Pet. App. 4a.

2. The district court denied petitioner's motion to suppress, and the court of appeals affirmed (Pet. App. 1a-20a). Addressing the claim that petitioner was unlawfully detained, the court of appeals explained (Pet. App. 9a-13a) that the agents' initial questioning of petitioner did not constitute a seizure until the point at which they stated that they suspected him of transporting drugs and requested permission to search his luggage. By that time, the agents had reasonable suspicion of criminal activity that supported an investigative detention, which never ripened into an arrest. The court also rejected the argument that the 75-minute detention of petitioner's luggage in order to subject it to a dog sniff was unreasonable (*id.* at 13a-18a), ruling that the detention "lies within the outer bounds of the Fourth Amendment." The court distinguished this Court's decision in *United States* v. *Place*, 462 U.S. 696 (1983), noting that the detention here was not the result of an

agent's lackadaisical failure to plan for the presence of a sniffing dog at the airport and that the agents did not mislead petitioner as to the contemplated disposition of his luggage.[1]

ARGUMENT

Petitioner contends that the agents here violated the Fourth Amendment in questioning him and in detaining his luggage for a dog sniff. These contentions were carefully considered by the court of appeals and were correctly rejected in an exhaustive opinion upon which we substantially rely. Moreover, the only dispute in this case is over the application of settled legal principles to the particular facts of this case. Accordingly, the petition presents no issue warranting review by this Court.

1. The court of appeals correctly held (Pet. App. 12a-13a) that, based upon the totality of the circumstances, the agents' detention of petitioner was based on reasonable suspicion. These circumstances included the facts that petitioner was arriving from a source city for narcotics, was attired inappropriately for a first class passenger, walked extremely fast with no apparent reason for doing so, appeared very nervous and dropped things when questioned, purchased an expensive ticket with cash, and, most important, lied to the agents when asked how long he had stayed in Orlando. Another factor identified by the court of appeals was petitioner's claimed inability to produce identification; contrary to petitioner's contention (Pet. 5-7), it was appropriate for the agents and the court to consider this

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[1]The court of appeals also upheld the district court's rejection of petitioner's claims that he was unlawfully seized when the DEA agents first approached him, that the investigative stop ripened into an arrest for which probable cause was required, and that he did not voluntarily consent to the search of his briefcase.

fact in assessing the degree of suspicion.[2] The court's conclusion that the totality of circumstances amounted to reasonable suspicion was correct. Compare *Florida* v. *Royer*, 460 U.S. 491, 503 (1983) (plurality opinion) (traveling under assumed name, paying cash for ticket, mode of checking luggage, and suspect's appearance and conduct in general constituted reasonable suspicion).

2. Petitioner contends (Pet. 9-10) that the court of appeals' failure to find that the detention of his luggage was illegal cannot be reconciled with *United States* v. *Place*, 462 U.S. 696 (1983). This factbound contention is without merit.

In *Place*, this Court upheld the practice of detaining luggage briefly in order to confirm or dispel a reasonable suspicion that it contains contraband. The Court concluded, however, that the 90-minute detention in that case was unreasonable. The Court observed (462 U.S. at 709-710 (footnotes and citation omitted)):

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[2]None of the authorities upon which petitioner relies suggest that it is unconstitutional to consider the suspect's refusal or failure to identify himself in making a determination whether there exists reasonable suspicion to detain him. In *Brown* v. *Texas*, 443 U.S. 47 (1979), this Court simply held that the officers there lacked reasonable suspicion to detain the defendant when they asked him for identification. The refusal to identify was the crime charged in that case, not, as here, a factor considered in determining whether there was reasonable suspicion of some other crime. Moreover, because Texas law made it a crime to refuse to identify oneself only if the individual had been lawfully seized, it was clear that the questioning could not be regarded as purely consensual. Brown was not free to refuse to answer the officers' questions; the opposite was true here (see Pet. App. 6a-8a). See generally *United States* v. *Mendenhall*, 446 U.S. 544, 556 (1980) (opinion of Stewart, J.). In *Moya* v. *United States*, 761 F.2d 322, 325 (7th Cir. 1984), and *United States* v. *Brown*, 731 F.2d 1491, 1494 (11th Cir. 1984), the courts said only that failure or refusal to identify oneself falls short of establishing probable cause to arrest.

> [I]n assessing the effect of the length of the detention, we take into account whether the police diligently pursue their investigation. We note that here the New York agents knew the time of Place's scheduled arrival at La Guardia, had ample time to arrange for their additional investigation at that location, and thereby could have minimized their intrusion on respondent's Fourth Amendment interests. Thus, although we decline to adopt any outside time limitation for a permissible *Terry* stop, we have never approved a seizure of the person for the prolonged 90-minute period involved here and cannot do so on the facts presented by this case. * * *
>
> Although the 90-minute detention of respondent's luggage is sufficient to render the seizure unreasonable, the violation was exacerbated by the failure of the agents to accurately inform respondent of the place to which they were transporting his luggage, of the length of time he might be dispossessed, and of what arrangements would be made for return of the luggage if the investigation dispelled the suspicion. In short, we hold that the detention of respondent's luggage in this case went beyond the narrow authority possessed by police to detain briefly luggage reasonably suspected to contain narcotics.

See also *United States* v. *Sharpe*, No. 83-529 (Mar. 20, 1985), slip op. 9-10 (emphasizing importance in *Place* of the finding that the police did not pursue their investigation diligently).

The court of appeals recognized that *Place* was the relevant authority; it carefully considered *Place* and found it distinguishable (see Pet. App. 16a-18a).[3] Most important,

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[3]We note at the outset that we do not agree that *Place* should be applied retroactively to this case. At the time of the events here, the

the court noted that the agents here were not anticipating petitioner's arrival with narcotics; therefore, they had no reason to have a drug detection dog immediately available to meet petitioner's flight from Orlando. This contrasts with *Place*, where the reason emphasized by the Court for finding a 90-minute detention too long was the agents' failure to take steps to have a dog ready to meet the incoming plane although their suspicion had already focused on Place. 462 U.S. at 709. Moreover, the Court relied in *Place* in part on the fact that the officers erroneously told the suspect that his bag was being taken to a judge (*id.* at 699, 710); here, the court of appeals found that agents did not "mislead [petitioner] regarding what they were doing with the bags" (Pet. App. 17a). Thus, the court of appeals correctly held that there were substantial differences between this case and *Place* that justified affirmance of the district court's judgment.[4]

There can be no serious suggestion that the decision in this case reflects a reluctance by the Seventh Circuit to follow *Place*. Indeed, in light of *Place*, the Seventh Circuit recently overturned a prior decision that had upheld a dog

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actions of the agents were clearly lawful under established Seventh Circuit law. See *United States* v. *Klein*, 626 F.2d 22 (7th Cir. 1980). The deterrent policies of the exclusionary rule cannot possibly be served by suppressing evidence obtained by police acting in accordance with judicially recognized standards. Because in the Seventh Circuit the decision in *Place* marked "a clear break with the past" (*Desist* v. *United States*, 394 U.S. 244, 248 (1969), established principles of retroactivity require that it not be applied to invalidate conduct that was clearly lawful at the time it was committed. See *United States* v. *Johnson*, 457 U.S. 537, 549-550 (1982). In any event, as discussed *infra*, the decision of the court of appeals is fully consistent with *Place*.

[4]Even if petitioner were correct (see Pet. 9) that *Place* holds that a 90-minute detention is always unlawful even if the police act diligently —an interpretation that this Court clearly appears to have rejected in *Sharpe*, slip op. 9—the decision below would still be consistent with *Place* because the detention was shorter than 90 minutes.

sniff detention. *Moya* v. *United States, supra*. The decision here is in accord with another post-*Place* decision involving similar facts. See *United States* v. *West*, 731 F.2d 90, 92-94 (1st Cir. 1984), cert. denied, No. 83-6885 (Jan. 21, 1985) (approving 60-minute luggage detention where police were found to have acted with due diligence even though sniffing dog not immediately summoned upon suspect's arrival). In sum, the decision below faithfully applies the legal principles established in *Place*, and the different result is based solely on the significant factual differences between the cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOHN F. DE PUE
Attorney

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